IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re EXPRESS SCRIPTS, INC. PBM LITIGATION	)	Master Case No. 4:05-md-01672-HEA
This Document Relates to: *Lynch* – 4:05-cv-00828 (HEA)	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR RENEWED MOTION FOR SUMMARY JUDGMENT ON LYNCH'S CLAIMS BASED UPON NEW YORK CONSENT JUDGMENT

COME NOW Defendants Express Scripts, Inc. and National Prescription Administrators, Inc. (collectively, "Express Scripts"), and in support of their renewed motion for summary judgment on the claims of Plaintiff Patrick Lynch ("Lynch"), as Trustee of the Health & Welfare Fund and Retiree Health & Welfare Fund of the Patrolman's Benevolent Association of the City of New York ("PBA Plans"), based upon the New York Consent Judgment, state as follows:

INTRODUCTION

Lynch's claims are barred because they were released by a binding Consent Order and Judgment ("Consent Judgment"). In the Consent Judgment, the People of the State of New York settled and released all claims against Express Scripts and its subsidiaries (including NPA) arising out of the same Covered Conduct as Lynch alleges in this lawsuit.

The New York Attorney General sued Express Scripts in New York state court, based upon Express Scripts' alleged conduct as PBM for New York

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benefit plans. In 2008, the New York Attorney General, on behalf of the People of the State of New York, entered into a Consent Judgment with Express Scripts. In the Consent Judgment, Express Scripts agreed to pay $27 million to the State of New York and implement wide-ranging injunctive relief that would inure to every Client Plan and every Consumer in New York. In exchange, the People of the State of New York released Express Scripts and its subsidiaries from all claims they "could have asserted" related to the "Covered Conduct," which is defined as either the contracts alleged in the Attorney General's Complaint or the allegations and acts alleged in his Complaint. *See* Consent Judgment (attached hereto as Exhibit 1), at ¶ 44.

Lynch brought this lawsuit in New York federal court in 2003, alleging that Express Scripts engaged in the exact same alleged wrongful conduct that was alleged in the Attorney General's Complaint. Lynch's lawsuit was transferred to this Court as part of this Multi-District Litigation (MDL) proceeding, which formerly consisted of approximately twenty lawsuits. As of this date, *Lynch* is the only lawsuit remaining in this MDL proceeding.

On July 2, 2010, Express Scripts filed a motion for summary judgment pertaining to five lawsuits brought by New York plans, including Lynch (the "NY Plaintiffs"), based upon the *res judicata* effect of the Attorney General Lawsuit and Consent Judgment ("Res Judicata Motion") [Dkt. Nos. 423-425].

On March 31, 2014, this Court entered its Opinion, Memorandum and Order, granting Express Scripts' Res Judicata Motion ("MSJ Order") [Dkt. No. 583] (attached as Exhibit 2). This Court examined the conduct alleged by the

Attorney General and by Lynch, and determined that both lawsuits were "based on precisely the same transactions and alleged misdeeds." *See* MSJ Order, pp. 4, 12, 20. The Court held that the New York Plaintiffs' claims are barred by *res judicata*, because (1) the claims of Lynch and the other New York Plaintiffs were based upon the same transaction or series of transactions as the Attorney General Lawsuit, and (2) the Attorney General was in privity with the New York Plaintiffs. *See* MSJ Order, pp. 15-20. Lynch appealed.[1]

On May 27, 2015, the Eighth Circuit Court of Appeals issued its Opinion. *See* Eighth Circuit Opinion (attached as Exhibit 3). The Eighth Circuit reversed the MSJ Order on the sole ground that Express Scripts had not shown privity between the New York Attorney General and the PBA Plans sufficient to establish a *res judicata* defense. *See* Eighth Circuit Opinion, pp. 5-9. Having resolved the appeal on that basis, the Eighth Circuit declined to address this Court's holding that the conduct and transactions underlying the two suits were the same. *Id.* at p. 9. The Eighth Circuit also declined to reach whether Lynch's claims are barred by the Consent Judgment, stating:

> The parties dispute whether the release language bars the Funds' claims. The district court did not reach this issue. Generally, a federal appellate court does not consider an issue not passed upon below. . . . This court declines to decide whether the release language bars the Funds' claims.

Eighth Circuit Opinion, p. 9 (citations omitted).

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[1] Express Scripts' Res Judicata Motion encompassed the following lawsuits: *Wagner/Scheuerman*, *Brynien*, *Correction Officers' Benevolent Association of the City of New York, Inc. ("COBA")*, and *Lynch*. None of the other Plaintiffs appealed the Court's Order granting summary judgment to Express Scripts, so those lawsuits are resolved.

Accordingly, because neither this Court nor the Court of Appeals has resolved whether Lynch's claims are barred by the Consent Judgment and Release, Express Scripts brings this renewed motion for summary judgment so that this Court can resolve this issue. Express Scripts respectfully requests the Court to grant it summary judgment on Lynch's claims, as Lynch's claims are barred by the Consent Judgment and Release, which extends beyond the scope of the *res judicata* effect of the Attorney General lawsuit.[2]

FACTUAL BACKGROUND[3]

A. Lynch's Claims in this Lawsuit.

Plaintiff Lynch is Trustee of two Health and Welfare Funds of the Patrolmen's Benevolent Association of the City of New York ("PBA Plans"). *See Lynch* Complaint (attached as Exhibit 4), at ¶¶ 1, 14; SOF, ¶ 1. The PBA Plans provide prescription drug benefits to current and retired New York City police officers, pursuant to a collective bargaining agreement with the City of New York. SOF, ¶ 2. The PBA Plans are funded by the City of New York. SOF, ¶ 3.

NPA served as the PBM for the PBA Plans from 1981 until April 2002. *See Lynch* Complaint, ¶¶ 14-15. In April 2002, Express Scripts purchased NPA, and NPA became a subsidiary of Express Scripts. *See id.*, ¶¶ 14-16.

[2] In addition to the instant motion, the parties have filed and fully briefed pending cross summary judgment motions on Lynch's common law fiduciary duty claim, which is Lynch's only remaining substantive claim. *See* Dkt. # 394, 493-497. Lynch's motion for class certification is also fully briefed and remains pending. *See* Dkt. # 395, 498.

[3] The undisputed material facts are set forth in detail, pursuant to Fed. R. Civ. P. 56 and Local Rule 7-4.01(E), in Defendants' Statement of Uncontroverted Material Facts in Support of their Motion for Summary Judgment on Lynch's Claims Based Upon New York Consent Judgment and Release, along with exhibits, filed contemporaneously herewith and incorporated herein (referred to as "SOF").

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Lynch alleges that "[f]rom April 2002 through August 2002, Express Scripts served as PBM to the PBA Plans." *See id.*, ¶¶ 14, 16, 22; SOF, ¶¶ 5-7. Lynch's Complaint seeks certification of a single nationwide class action against Express Scripts and NPA – which it lumps together as the "PBM Defendants" – and alleges that all plans' claims "arise out of similar, if not identical facts, constituting the wrongful conduct of Defendants." *See id.*, ¶¶1, 38, 40-41, 43.

Lynch asserts the following alleged conduct by the "PBM Defendants":

- The PBM Defendants allegedly "create[d] pricing 'spreads'" by contracting with retail pharmacies (retail pharmacy spreads) and drug manufacturers (mail order pricing spreads) to receive price discounts for drugs and then charging higher rates to the Plans. *See Lynch* Complaint, ¶¶ 3, 26(a)-(d), 58(a)-(b) ("Spread Claims");
- The PBM Defendants allegedly entered into contracts with drug manufacturers, by which the PBMs receive certain discounts, or rebates. *Id.*, ¶¶ 4, 26(e), 58(c) ("Rebate Claims");
- The PBM Defendants allegedly received benefits from drug manufacturers for favoring specific drugs on their drug formularies and incentivizing Plan members to utilize specific favored drugs. *Id.*, ¶¶ 5, 26(f)-(g), 58(d) ("Drug Switching Claims").
- The PBM Defendants allegedly artificially inflated prescription drug prices. *Id.*, ¶¶ 53(e), 58(e) ("Price Inflation Claims"); and
- The PBM Defendants allegedly sold data concerning Plan members. *Id.*, ¶ 58(f) ("Data Claims").

B. The New York Attorney General Lawsuit.

On August 4, 2004, the New York Attorney General sued Express Scripts in New York state court (the "Attorney General Lawsuit"). *See* Complaint in Attorney General Lawsuit ("AG Complaint," attached hereto as Exhibit 5). The Attorney General sued Express Scripts on behalf of: (1) the People of the State of New York; (2) the State of New York; and (3) the New York Department of Civil Service ("NY DCS"), the administrator of the New York State Health Insurance Plan ("NYSHIP") and the Empire plan, pursuant to his authority under NY Executive Law §§ 63(1) and (12) and NY General Business Law ("GBL") Article 22-A, § 349. *See* AG Complaint, ¶¶ 24- 27; SOF, ¶¶ 8-10.

The Attorney General Lawsuit asserted the following alleged conduct:

- Express Scripts allegedly created pricing "spreads" by contracting with retail pharmacies to pay them for drugs at prices that differed from the rates paid by the Plans. *See* AG Complaint, ¶¶18-20, 107-108, 111 ("Spread Claims");

- Express Scripts allegedly entered into contracts with drug manufacturers by which Express Scripts received certain rebates. *See* AG Complaint, ¶¶1, 12, 88 ("Rebate Claims");

- Express Scripts allegedly received payments from drug manufacturers for favoring a manufacturer's drugs through its "drug preference" and drug "switching" programs. *See* AG Complaint, ¶¶1, 126-141 ("Drug Switching Claims");

- Express Scripts allegedly artificially inflated prescription drug prices. *See* AG Complaint, ¶¶108-112 ("Price Inflation Claims"); and

- Express Scripts allegedly sold data concerning plan members. *See* AG Complaint, ¶¶13, 96-99 ("Data Claims").

C. The Attorney General Entered Into A Consent Judgment Releasing Express Scripts And Its Subsidiaries From All Claims.

On or about July 25, 2008, the Attorney General and Express Scripts entered into a Consent Order and Judgment ("Consent Judgment"). *See* Consent Judgment (attached as Exhibit 1). The Consent Judgment was executed by the Attorney General on behalf of "the People of the State of New York, the New York State Department of Civil Service, and the State of New

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York." *See* Consent Judgment, ¶ 22. The Consent Judgment binds "ESI," which it defines as "Express Scripts Inc. and ESI Mail Pharmacy Service, Inc., and their respective past and present subsidiaries, affiliated companies, corporate predecessors, successors and assigns." *Id.*, ¶ 16; SOF, ¶¶ 11-13.

Pursuant to the Consent Judgment, Defendants agreed to pay $27 million to the State of New York. *See* Consent Judgment, ¶ 4. Express Scripts also agreed to specific injunctive relief that will inure to every Client Plan and Consumer in New York. *Id.*, ¶¶ 26-41. The Consent Judgment broadly defines "Client Plan," to include "any other pharmacy benefit plan with its principal place of business in New York State for which Defendants either provide or administer a pharmacy benefit plan in New York State." *Id.*, ¶ 9. The Consent Judgment defines "Consumer" as any "person who receives prescription drug benefits under a plan sponsored by a Client Plan." *Id.*, ¶ 10; SOF, ¶¶ 14-17.

In return, the State of New York agreed to the following broad release:

> The Plaintiffs, individually and collectively, **release all Defendants and their respective past and present parent corporations, subsidiaries, affiliates**, limited liability companies, and partnerships, and the respective past and present officers, directors, employees, agents, and attorneys of any of them, as well as the respective predecessors, successors, executors, administrators and assigns of any of them (collectively, the "Released Persons") **from any and all civil claims, damages, penalties, and causes of action, which the Plaintiffs could have asserted** through and including the Effective Date of this Judgment, **related either to the parties' performance under the contracts or subcontracts specified in the Complaint** or any amendments thereto, **or to any allegations, omissions, or acts that are contained in the Complaint filed in this action (the "Covered Conduct").**

See Consent Judgment, ¶ 44(a) (emphasis added); SOF, ¶¶ 18-19.

LEGAL ANALYSIS

The Consent Judgment is clear and unambiguous: In return for $27 million and injunctive relief, the People of the State of New York agreed to release Express Scripts and its subsidiaries from all claims related to the Covered Conduct. The conduct alleged by Lynch fits squarely within this Release, and is therefore barred.

"It is well established that settlement agreements and general releases are contracts construed according to general principles of contract law." *Wang v. Paterson*, 2008 WL 5272736, at *4 (S.D.N.Y. 2008) (citation omitted). "The significance of the release, like that of any contractual provision, must be assessed independently and in accordance with its plain and unambiguous language." *Lewis v. City of New York*, 2011 WL 3273939, at * 7 (E.D.N.Y. July 29, 2011) (citations omitted). "Federal courts have articulated a strong policy in favor of enforcing settlement agreements and releases." *Id.* (citation omitted).

"[W]hether a claim is barred under *res judicata* and whether a claim is barred by a contractual release are separate and distinct questions." *Orakwue v. City of New York*, 2013 WL 5407211, at n. 8 (E.D.N.Y. Sept. 25, 2013). The preclusive effect of a broad release extends beyond just those claims that would be barred by *res judicata*. *See Wang*, 2008 WL 5272736, at *5. In *Wang,* the court held that a release's broad scope demonstrated "the parties' intention to preclude claims based on those facts, irrespective of whether they would be precluded by *res judicata*." *Id.* at *5. The court reasoned that limiting the scope of a release to its *res judicata* effect "would render the release provision

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redundant," since *res judicata* would apply to the consent judgment in any event. *Id.* at n. 8. *Accord Lewis,* 2011 WL 3273939 at *6-7 (holding that claims were barred by broad settlement and release in prior lawsuit, even though they involved transactions that would not have been barred by *res judicata* effect of prior lawsuit).

Here, the Consent Judgment broadly released all claims that the Attorney General brought or could have brought against Express Scripts and its subsidiaries based upon the Covered Conduct. The Consent Judgment encompassed and released all of Lynch's claims – regardless of whether those claims would be barred by the *res judicata* effect of the Attorney General Lawsuit – in the following respects:

First, the Consent Judgment released all of Express Scripts' subsidiaries, including NPA. The Release provides that Plaintiffs "release all Defendants and their respective past and present parent corporations, subsidiaries, affiliates …." *See* Consent Judgment, ¶ 44. And the Consent Judgment defines "Express Scripts" to mean "Express Scripts, Inc. … and their respective past and present subsidiaries, affiliated companies…." *Id.*, ¶ 16. Thus, there can be no dispute that the Consent Judgment specifically released all claims against NPA, a subsidiary of Express Scripts.

In *Wang*, the court held that a settlement and release of defendant and its "officials, officers, employees . . . [and] agents" barred subsequent claims against officials and employees *who were not defendants in the original lawsuit* – regardless of whether such claims would have been barred by *res judicata*:

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> [T]he release provision itself expressly extends its preclusive effect to a long list of persons and entities, irrespective of whether those persons and entities would fall within claim preclusion's privity limitation. Accordingly, the Court concludes that the Stipulation unambiguously reflects the parties' intention to preclude a wide class of potential claims and litigants without reference to the contours of res judicata.

Id. at *5. *See also In re Y&A Securities Group Litig.*, 38 F.3d 380 (8th Cir. 1994) (holding that settlement of class action which released Y&A and "all other actual and potential defendants" also released claims against broker who was not a party to the class action); *Barone v. Marone*, 2007 WL 4458118, at *4-5 (S.D.N.Y. Dec. 14, 2007) (holding that release of claims against company and its "agents" precluded subsequent suit against company's employee).

Second, the Release includes all "Covered Conduct," which it defines as all claims related to either (1) the contracts specified in the AG Complaint or (2) "any allegations, omissions or acts that are contained in the AG Complaint." *See* Consent Judgment, ¶ 44. The Consent Judgment's two-pronged definition of Covered Conduct proves that the Release extends beyond the government contracts specified in the AG Complaint, or else the second clause would be superfluous. *See Givati v. Air Techniques, Inc.*, 960 N.Y.S.2d 196, 198 (N.Y. App. Div. 2013) ("a court should not read a contract so as to render any term, phrase, or provision meaningless or superfluous").[4]

As this Court has already found, Lynch's Complaint alleges the exact

[4] In addition, the inclusion of all Express Scripts subsidiaries confirms that the parties intended the Release to cover more than just the contract with New York State, because the only Express Scripts subsidiary that had a contract with the State's Empire Plan was ValueRx. The inclusion of the other subsidiaries would have been superfluous if the Release were limited to the Empire Plan.

same Covered Conduct as alleged in the Attorney General Lawsuit. *See* MSJ Order, pp. 4, 11-12. Both lawsuits allege that the PBM Defendants engaged in wrongful conduct with respect to the PBM program, including Spread Claims, Rebate Claims, Drug Switching Claims, Price Inflation Claims and Data Claims. *See supra*, pp. 5, 6. In its MSJ Order, this Court examined the conduct alleged by Lynch and the PBA Plans against the PBM Defendants:

> Plaintiffs' claims are based upon the following alleged conduct: pharmacy pricing spreads; mail order pricing spreads, retaining rebates and other moneys from manufacturers; drug "switching" programs; inflating prices of prescription drugs; and selling plan information.

See MSJ Order, pp. 11-12.

The Court similarly examined the allegations in the Attorney General Lawsuit, which alleged the following conduct by the PBM Defendants:

> Retaining rebates and money that allegedly belonged to the plans; "Artificially inflating" pass-through prices of generic drugs and manipulating its pharmacy pricing "spread"; Selling plan data . . . and Fraudulently operating its "drug preference" and drug "switching" programs.

See MSJ Order, p. 4.

Based upon this same alleged conduct, this Court held that Lynch's lawsuit and the Attorney General Lawsuit involved the same transaction or series of transactions. *See* MSJ Order, p. 17. The Court of Appeals declined to address this holding. *See* Eighth Circuit Order, p. 9. This Court's holding is law of the case and should not be revisited. *See Gleason v. SSM Health Care St. Louis*¸ 2012 WL 3637741 (E.D. Mo. Aug. 22, 2012) (granting summary judgment based upon court's prior ruling under "law-of-the-case" doctrine).

Third, the Consent Judgment was not limited to the claims asserted in the Attorney General Lawsuit, as the Release also extends to all claims "which the Plaintiffs *could have asserted*" related to the Covered Conduct. *See* Consent Judgment, ¶ 44 (emphasis added). New York courts consistently hold that a release that extends to claims which plaintiff "could have asserted" encompasses all claims that could have been joined in the lawsuit, which is broader than *res judicata.*

For example, in *Orakwue*, the court held that a settlement and release of all claims "which were or could have been alleged in this action" barred a second lawsuit which was based upon an entirely different incident, because the claims arising from the second incident could have been joined in the prior lawsuit under Fed. R. Civ. P. 18(a) and 20(a). *See* 2013 WL 5407211 at * 7-10. The court rejected plaintiff's reliance on cases relating to whether the claims would have been barred by *res judicata*, holding: "even if the claims at issue here were not previously litigated – making *res judicata* inapplicable – they could still be barred by the release." *Id.* at n. 8. *See also Chepilko v. City of New York*, 2012 WL 2792935 (E.D.N.Y. July 6, 2012) (release of all claims "which were or could have been alleged in this action" barred subsequent suit based on any claims that could have been joined under Fed. R. Civ. P. 18(a) and 20(a)); *Lewis*, 2011 WL 3273939, at * 6 (holding release was not limited to claims actually brought, because "a claim may be released without having previously been litigated," and plaintiff's argument that the release was limited to *res judicata* effect of judgment "would render the release provision redundant") (citing *Wang*, 2008 WL 5272736, at * 5); *Loccenitt v. Pantea*, 2014 WL 7474232, at n. 2 (S.D.N.Y. Dec. 29, 2014) ("Had the parties wanted to limit the release to the claims raised in [lawsuit], they could have done so"); *Tromp v. City of New York*, 465 Fed.Appx. 50, 2012 WL 739488 (2nd Cir. 2012) (holding broad settlement released all claims that "could have been alleged" in lawsuit).

The Attorney General, on behalf of the People of the State of New York, could have asserted the very claims that Lynch asserts in this lawsuit, both under his authority under Executive Law § 63(1), (12) and through his *parens patriae* authority.[5] And the Attorney General certainly could have joined these claims in his lawsuit. Like Federal Rule 18(a), New York's liberal joinder rules allow a plaintiff to join "as many claims as it has against an opposing party." *See Prudential-Bache Securities Inc. v. Golden Larch-Sequoia, Inc.*, 500 N.Y.S.2d 1 (Sup. Ct. App. Div. 1986) ("A plaintiff may join as many causes of action as it may conceivably have ([NY] CPLR 601) against as many defendants as may be liable (CPLR 1002(b)) in a single suit"). Accordingly, these claims which could have been asserted are included in the Release.

Fourth, the Consent Judgment obtained relief on behalf of all New York Plans and Consumers, confirming that the Release encompasses any claims by such plans based on the Covered Conduct. *See Wang*, 2008 WL

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[5] The Eighth Circuit held that the Attorney General's Complaint *did not affirmatively invoke* his *parens patriae* authority or assert claims for relief for plans other than the enumerated government plans. *See* Eighth Circuit Opinion, pp. 5-8. The Eighth Circuit did not hold that the Attorney General *could not* have invoked such authority on behalf of all New York plans and consumers; had the Eighth Circuit held that the Attorney General *could not* litigate or release claims on behalf of other New York plans or consumers, it would not have left the scope of the Release's language open for further determination. *See* Eighth Circuit Opinion, p. 9.

5272736, at * 5 and n. 10 ("The Court must interpret the release provision within the context of the Stipulation.").

Express Scripts agreed to implement injunctive relief in the form of various business practices that will inure to every "Client Plan" and "Consumer" in New York, and not just the Empire Plan or other government plans. *See* Consent Judgment, ¶¶ 26-40. The Consent Judgment defines "Client Plan" to include "*any other pharmacy benefit plan with its principal place of business in New York State* for which Defendants either provide or administer a pharmacy benefit plan in New York State." *See* Consent Judgment, ¶ 9. The injunctive relief thus benefits every New York plan and consumer, including the PBA Plans, that may at any time seek to enter into a PBM arrangement with Express Scripts or any of its subsidiaries.

Finally, all parties clearly intended to grant Express Scripts the broadest release possible, in exchange for significant monetary and injunctive relief that would inure to the benefit of all New York consumers. Express Scripts agreed to pay $27 million to the People of the State of New York and implement broad injunctive relief that would inure to all Client Plans and Consumers in New York. In exchange, Express Scripts secured a broad release to protect it and its subsidiaries from future claims. *See Barone*, 2007 WL 4458118, at * 5 (release of party interpreted broadly to include release of claims against its agent, "in light of the parties' stated intention to achieve global peace").

Allowing Lynch to pursue his claims would deprive Express Scripts of the

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benefit of its bargain. Express Scripts did not control how the Attorney General allocated the State's $27 million recovery among New York plans or consumers, and whether the PBA Plans were entitled to payment out of this recovery is between them and the Attorney General. If Express Scripts is forced to pay a judgment in this lawsuit, Express Scripts will lose the benefit of the Release for which it bargained and the New York plans will obtain a double recovery.

CONCLUSION

WHEREFORE, Defendants respectfully request that the Court grant them summary judgment on Lynch's claims, based upon the Consent Judgment and Release, and for such other and further relief that this Court deems just and proper.

Dated: June 25, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of June, 2015, the foregoing was filed electronically with the Clerk of Court, to be served by operation of the Court's electronic filing system upon all counsel of record.

/s/ Thomas M. Dee

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